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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1956

No. 748

TANKPORT TERMINALS, INC.,

Petitioner,

—against—

WILLS LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE THE PETITION FOR WRIT OF MANDAMUS HERETO ANNEXED

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Tankport Terminals, Inc. (herein called Tankport), claimant in a Limitation of Liability proceeding, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit entered on November 22, 1955, which dismissed an appeal from an order of the United States District Court that allowed a petitioner in a Limitation of Liability proceeding to contest its liability without furnishing the security which the District Court had previously found on due appraisement of the vessel to be her value. Tankport contends that though interlocutory, the order from which the appeal was taken is appealable within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. In the alternative, Tankport prays that this Court issue a writ of mandamus to vacate the order of the District Court and direct the entry of an order which would require the petitioner in the

Limitation of Liability proceeding to file the security in the amount of the due appraisement of the vessel as a condition of its right to contest its liability, as required by Rule 53 of the Admiralty Rules of this Court.

Opinions Below

The opinion of the Court of Appeals (Appendix, p. 27; R. 64a) is unreported. The opinion of the District Court (R. 6a) is likewise unreported.

Jurisdiction

The order of the Court of Appeals (R. 69a) was entered on November 22, 1955. A timely petition for rehearing was denied by the Court of Appeals without opinion by order entered December 13, 1955 (R. 81a). The jurisdiction of this Court insofar as certiorari to review the order of dismissal is concerned, is invoked under 28 U. S. C., Sec. 1254 (1). The jurisdiction of this Court to entertain the alternative prayer for the issuance of a writ of mandamus is invoked under 28 U. S. C., Sec. 1651.

Questions Presented

1. Whether the order of the District Court which allowed the petitioner in the Limitation of Liability proceeding to contest its liability without furnishing the undertaking required by Rules 51, 52 and 53 of this Court's Admiralty Rules was reviewable by the Court of Appeals within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, in that though technically interlocutory, the order was such as to "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U. S. at 546).

2. If the order of the District Court is appealable, whether the Courts below had any discretion under Rules 51 and 53 of this Court's Admiralty Rules to allow the petitioner in the limitation proceeding to contest its liability in that proceeding without furnishing the security required by those rules.

3. Assuming that the Courts below had discretion in the matter, whether in the circumstances of this case the refusal to enforce the requirement of Rules 51 and 53 of this Court's Admiralty Rules as a condition precedent to allowing the petitioner in the limitation proceeding to contest its liability was an abuse of discretion.

4. Whether, assuming that the order of the District Court was not appealable, the Court of Appeals should have awarded petitioner a writ of mandamus directing the District Court to vacate the order that was the subject of the appeal, and commanding that the District Court enter an order denying the petitioner in the limitation proceeding the right to contest its liability or that of its vessel unless it furnished the security required of it under Rules 51 and 53 of this Court's Admiralty Rules.

Statutes Involved

The pertinent provisions in the Limitation of Liability Act (46 U. S. C. Sections 183 and 185) are set forth in the Appendix, *infra*, pages 22-23. The pertinent provisions of Rules 51, 52 and 53 of the Admiralty Rules of this Court are set forth in the Appendix, *infra*, pages 23-26.

Statement

Wills Lines, Inc., a New York corporation, as owner of the M/V MAYFAIR, filed a petition for limitation of, and exoneration from, liability in the District Court of the

United States for the Southern District of New York, by reason of a collision on January 15, 1953, between the M/V MAYFAIR and a dock in possession of Tankport Terminals, Inc. as lessee thereof. Tankport filed a claim in said proceeding, stating that its dock had been damaged in the amount of approximately $40,000.00 as the result of the collision. Wills Lines, Inc. filed an *ad interim* stipulation for value in the sum of $15,056.25, with an appropriate surety, containing the usual undertaking, in accordance with Rule 51 of the Supreme Court Admiralty Rules, that a further stipulation would be filed if on due appraisement of the M/V MAYFAIR additional security was required (R. 52a). Thereafter, the District Court after a hearing before a Commissioner, appointed to determine the value of the M/V MAYFAIR at the time of the accident, found her value and pending freight to be $30,056.25, or $15,000.00 in excess of the amount of the *ad interim* stipulation. Thereafter, by an Order of the District Court, dated September 16, 1954, Wills Lines, Inc. was directed to file an additional stipulation with an appropriate surety in the amount of $15,000.00 within ten (10) days after service of a copy of the Order with notice of its entry (R. 17a).

After due service of the aforesaid Order with notice of its entry, upon Wills Lines, Inc., Wills Lines, Inc. failed to obey the mandate of the Order. A motion was then made by Tankport to require Wills Lines, Inc. to file the additional security in the amount of $15,000.00, and if Wills Lines, Inc. persisted in its default, to deny it the right to contest its liability for the claim which Tankport had filed in said limitation proceeding. This application was based upon Rule 53 of the Supreme Court Admiralty Rules which declares explicitly that a petitioner in a limitation proceeding may not contest its liability unless it has furnished the security called for on due appraisement of its vessel as

provided for in Rule 51 of this Court's Admiralty Rules. Rule 53 reads in this regard as follows:

> "53. RIGHTS OF OWNER TO CONTEST LIABILITY AND OF CLAIMANTS TO CONTEST EXONERATION FROM LIABILITY OR LIMITATION OF LIABILITY OF OWNER. In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 * * * *"

Appendix, page 25, *infra.*

The aforesaid motion was heard by Hon. Sylvester J. Ryan, a Judge of the United States District Court. Judge Ryan denied the application to bar Wills Lines, Inc. from contesting its liability, and instead made the following Order (R. 4a):

"It is

ORDERED, that petitioner's petition herein for exoneration from, or limitation of, liability insofar as it seeks to limit petitioner's liability to petitioner's interest in the M/V MAYFAIR, and her pending freight, be and it hereby is denied; and it is further

ORDERED, that the order issued on the monition herein dated April 1, 1953, staying all suits, be and the same hereby is vacated; and it is further

ORDERED, that claimant's motion for the entry of an interlocutory decree in favor of claimant against petitioner by reason of petitioner's default for failure to file proper security in accordance with the rules in these cases made and provided, be and the same hereby is denied; and it is further

ORDERED, that the claimant may proceed to trial on its claim in this proceeding, or, if it so elects, may proceed

by independent suit against the M/V MAYFAIR and her owner, Wills Lines, Inc., the petitioner herein; and it is further

ORDERED, that claimant's motion for a reargument be and the same hereby is denied."

Tankport appealed to the United States Court of Appeals for the Second Circuit from the aforesaid order of Judge Ryan and that Court dismissed the appeal on the ground that Judge Ryan's Order was not a final order and was not appealable within the exception to the final order doctrine within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (Opinion, R. 64a).

In the belief that under the mandate of Rule 53 of this Court's Admiralty Rules, the District Court was bound to exercise its authority to enforce the command of the Rule, as a condition precedent to allowing Wills Lines, Inc. to contest its liability, Tankport filed a petition for mandamus shortly after its petition for rehearing had been denied, the object of which was to require the District Court to vacate Judge Ryan's order and to deny Wills Lines, Inc. the right to contest its liability, or the liability of the M/V MAYFAIR, unless it deposited the sum of $15,000.00, or filed an additional stipulation in that amount with an approved surety within ten days after the service of such order, with notice of entry. The application for mandamus was denied by the Court of Appeals without opinion (R., Mandamus proceeding, p. 9).

Specification and Errors to Be Urged

1. The Court of Appeals erred in holding that Judge Ryan's order was not appealable within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546.

2. The Court of Appeals erred in not holding that the District Court under the Limitation of Liability statute and under Rules 51, 52 and 53 of this Court's Admiralty Rules had no discretion but to enforce the statute and the Rules of this Court by denying Wills Lines, Inc., the Petitioner in the Limitation of Liability proceeding, the right to contest its liability unless it either deposited $15,000.00, or furnished a proper undertaking in that amount as it had been previously ordered to do after due appraisement of its vessel had been had.

3. Assuming, contrary to our view, that the District Court had discretion to allow the Petitioner in the Limitation proceeding to contest its liability before putting the Court in possession of a fund equal in amount to the value of its vessel as found on due appraisement, the Court of Appeals erred in not holding that the District Court had abused its discretion in the circumstances of this case by relieving Wills Lines, Inc. of its statutory obligation to furnish such security as a condition precedent to its right to contest liability.

4. The Court of Appeals erred in dismissing the appeal from Judge Ryan's order without passing upon the merits.

5. Assuming that the order of Judge Ryan was not appealable because it is interlocutory, the Court of Appeals erred in not granting the later application by awarding a writ of mandamus directing the District Court to vacate its order and commanding that Court to obey the mandate of Rule 53 of the Admiralty Rules of this Court and to enter an order denying Wills Lines, Inc., the right to contest its liability or that of its vessel unless it furnished the additional security that it had been ordered to furnish after due appraisement of its vessel under Rules 51 and 52 of this Court's Admiralty Rules.

Reasons for Granting the Writ of Certiorari

This Court has carefully considered the fundamental nature of the Limitation of Liability proceeding in *Black Diamond SS Corp.* v. *Stewart & Sons,* 336 U. S. 386. In that case, the Court of Appeals had affirmed a dismissal of a petition for limited liability. The question on which the decision turned was whether a petitioner for limitation could elect to post security in lieu of a surrender of his ship measured by the maximum limit of liability as fixed, according to the law of the place where the disaster occurred, in this case, Belgium, even though the foreign law limitation limit was very much less than the value of the ship. In substance, this Court held that a resolution of the question should await a determination, on remand, by the District Court on a record that would present the question more adequately than that before the Court. But, even so, this Court directed that the vessel owner should post a bond for the value of the ship, plus freight, as required by our Limitation statute and this Court's Rules. An excellent analysis of the Limitation Proceeding is found in the opinion of Mr. Justice Jackson, writing for himself and Mr. Justices Reed and Douglas, in which it is pointed out:

> "Our statute is clear: sec. 4285 fixes the maximum liability at ship plus freight and sec. 4285 sets the minimum security at the same figure. To provide any other limit of liability or security is to rewrite both sections. As written, the two sections provide and are designed to provide a provisional remedy to let the ship go her way while the creditors are secured as well as if she were held in custody to pay their claims" (336 U. S. at 400).

Mr. Justice Jackson went on to note that under the Supreme Court Rules in Admiralty, the petitioner for Limitation must either surrender the ship and her freight, or stipulate with adequate bond to pay into Court its value. He noted:

> "The owner is at liberty to contest his liability or the liability of the vessel 'provided he shall have complied' with the requirements of surrender or deposit as above set forth. Rule 53.
>
> We think such compliance is a condition precedent to obtaining a forum concursus to adjudicate liability" (336 U. S. at 401).

Judge Jackson and his dissenting colleagues differed from the majority only in that they feared that the action of the majority might lead to confusion in the application of the statute (366 U. S. at 399). In the dissenting opinion, Mr. Justice Rutledge stated the matter even more forcefully when he said:

> "I agree with Mr. Justice Jackson that, when Congress gave shipowners the privilege of limiting their liability and conditioned that privilege, in the alternative, upon turning over the vessel and freight for the benefit of claimants or depositing with the court cash or approved security of equivalent value, it meant exactly what it wrote into the statute concerning the amount of the security to be given (336 U. S. at 404).
>
> * * * * *
>
> For satisfying their unrestricted claims it substituted a fund instead of the owner's general and unlimited liability. That fund was the vessel's value or its equivalent. *Nor was this a subordinate feature of the scheme of limitation. It was the very heart of that scheme,* and, in my opinion, was intended to create a general

and uniform policy for application in American courts" (336 U. S. at 406). (Italics supplied.)

From the foregoing, it is clear that both the majority and the dissenting Justices were in agreement that the statute and the implementing Admiralty Rules mean exactly what they say in that a petitioner who seeks Limitation of, or exoneration from, liability must either surrender his ship, or substitute a fund of equivalent value and that nothing less will do.

The cardinal error of the District Court was a failure to keep in mind the fundamental character of the Limitation of Liability fund as a substitute for the vessel.

In our view, the Court of Appeals should have corrected this error because we believe that the order was appealable within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 and *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684. The *Compania Caribe* case holds that an order which, in effect, deprives a litigant of a right to security is appealable because that right is collateral to the merits of the claim in suit, is not an ingredient of that claim, and is therefore not within the scope of the issues to be decided by the final judgment on the merits. Here, the Courts below failed to appreciate that the entire object of the sharply contested "due appraisement" proceeding and the subsequent applications to require security in the amount found to be the value of the vessel, were designed to require the Petitioner to put the Court in possession of the fund, or equivalent security, that under the statute and this Court's rules, it had undertaken to furnish. In short, the limitation fund is a security to the claimants which the statute demands and the rules of this Court require to be furnished as a condition precedent to allowing Wills Lines, Inc. to contest its liability.

Judge Ryan's order completely subverts the statutory scheme as implemented by Rules 51, 52 and 53 of this Court's Admiralty Rules. By failing to put teeth in the order for security, Judge Ryan has, as a practical matter, vitiated claiman's adjudged right to additional security. Nor is it true, a the opinion of the Court of Appeals suggests, that claimant's objection will merge in the judgment if claimant should prevail on the merits of the case. The Court's observation focuses on the failure to grant an interlocutory decree, but loses sight completely of the only practical and important aim of claimant's application, namely, vindication of its right to security, so that if it should prevai on the merits, it can satisfy its judgment. It is, indeed, true that at common law a plaintiff must await the day of final judgment in many situations before he can take steps to satisfy his judgment. The whole course and history of the Admiralty, however, like that of certain common law jurisdictions, even today, proceed on the practical basis that the right to defend is conditioned upon furnishing security. In the Admiralty this requirement is recognized by statute and by rules of this Court having the force of statutes; it also implements a policy that gives expression to the peculiar characteristics of vessels engaged in commerce. A vessel may touch at a local port for a day, and never thereafter return to the same jurisdicton; a vessel is subject to maritime liens some of whicl contrary to common law concepts, take precedence in the reverse order of their attachment; a vessel is faced with a variety of physical hazards that exceeds those to which most other kinds of personal property are exposed. These practical considerations underscore the necesity for the historic requirement of security as a prerequiste to defending on the merits. They have given rise to the requirement of the Admiralty that security must be furnished before a vessel is released from arrest.

From what has been said, it is clear that the Court of Appeals should have held the order of Judge Ryan to be reviewable, and on the merits should have reversed the order and directed that Wills Lines, Inc. should be allowed to contest its liability or that of its vessel only upon furnishing the additional security found to be required after due appraisement of the vessel.

But even if we are in error in considering that Judge Ryan's order was reviewable under the "collateral order doctrine" of the *Cohen* case, we, nevertheless, believe that this is an appropriate occasion for the use of the writ of mandamus as the means of compelling the District Court to enforce the mandate of the Limitation statute and of Rules 51, 52 and 53 of the Admiralty Rules of this Court because a failure to enforce Rule 53 would open the door to frauds upon the Court and litigants in cases such as this. The petition of Wills Lines, Inc. herein contains the following prayer:

> "1. That this Court will cause due appraisement to be made of the amount or value of petitioner's interest in the motor vessel MAYFAIR and her pending freight for the aforesaid voyage" (R. 24a).
>
> "2. That the Court make an order directing petitioner to file a stipulation with approved surety for the payment into Court of the amount of petitioner's said interest whenever the Court shall so order" (R. 24a).

The *ex parte* order obtained by Wills Lines, Inc. for an *ad interim* stipulation contained this provision:

> "Ordered that any party may apply to have the amount of said stipulation increased or diminished, as the case may be, upon the filing of the report of the Commissioner appointed to appraise the amount of the

value of the petitioner's interest in said motor vessel and her pending freight, if any, or upon the ultimate determination of the Court upon exception to the Commissioner's report" (R. 8a).

Upon petitioner's representation that it would furnish the necessary security it induced the Court to issue a restraining order signed by Judge Irving R. Kaufman on March 31, 1953, which contains the following:

"A petition having been filed herein on the 31st day of March, 1953, by Wills Lines, Inc., * * * and on reading and filing the affidavits of value of the petitioner's interest in the said motor vessel MAYFAIR and its pending freight, verified the 27th day of March, 1953, and filed herein on the day of March, 1953, and the ad interim stipulation for value executed by Wills Lines, Inc., petitioner, and the U. S. Fidelity & Guarantee Co. in the sum of Fifteen Thousand Fifty-six and 25/100 ($15,056.25) Dollars with interest from the 15th day of January, 1953, and filed herein on or about the 31st day of March, 1953, undertaking to pay into Court within ten days after the entry of an order confirming the report of the Commissioner to be appointed to appraise the amount or value of the petitioner's interest in the motor vessel MAYFAIR and its pending freight, if any, or to file in this proceeding a bond or stipulation in the usual form with surety in said amount, and that pending the payment into Court of the amount or value of the petitioner's interest in the said vessel, and its pending freight as ascertained, if any, or the giving of a stipulation therefor, the said bond shall stand as security for all claims in said limitation proceeding,

* * * and it is further

ORDERED that the beginning or prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever, except in the present proceeding, in respect to any claim arising out of, consequent upon or connected with the aforesaid collision of the M/V MAYFAIR on or about the 15th day of January, 1953, referred to in the petition, or at any time during the voyage upon which the said motor vessel MAYFAIR was then engaged, be and they hereby are stayed and restrained until the hearing and determination of this proceeding, * * *" (R. 9a-11a).

If the petitioner had not obtained its restraining order upon the representation that it would furnish such security as the Court might require, claimant could have filed its libel against the M/V MAYFAIR. The petitioner would then have had the alternative either of bonding the vessel or eventually permitting it to be sold by the Court. If the petitioner wished to release the vessel immediately, it would then have had to furnish the Marshal with security for twice the amount of the claim (see 28 U. S. C., Section 2464), which in this case would have been $80,000. Or, if the petitioner did not choose to file a bond with the Marshal, it could follow the procedure under Rule 12 of the U. S. Supreme Court Admiralty Rules, and file security for the real value of the vessel after due appraisement by the Court.

Instead, Wills Lines, Inc. chose to invoke a Limitation of Liability proceeding and to file an *ad interim* stipulation for value instead of surrendering the vessel. To allow Wills Lines, Inc. in these circumstances to defend on the merits without posting the security required by the statute and Rules of this Court would encourage fraud in Limita-

tion proceedings. If the services of an unscrupulous surveyor are available, all petitioner need do is obtain an affidavit fixing the value of the vessel at a fraction of her worth. On the strength of this affidavit, petitioner can then obtain an *ex parte* injunction forbidding anyone from attaching the vessel and remove the vessel from the jurisdiction beyond the reach of the claimants. Thereafter, when the real value of the vessel is ascertained by a Commissioner, claimants could not enforce the posting of further security and if the petitioner is financially irresponsible, they would be unable to collect any sums in excess of the inadequate *ad interim* stipulation.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for certiorari should be granted, and this Court should reverse the Order of the Court of Appeals holding that the District Court Order sought to be reviewed is not appealable, and directing the District Court to vacate its said Order, and enter an Order granting Tankport's application to deny Wills Lines, Inc. the right to contest its liability or that of its vessel unless it furnishes the additional security which the District Court had ordered it to file.

If this Court deems the said Order sought to be reviewed not appealable because not a final Order, then we believe that mandamus should be awarded in this case in order to require the Courts below to comply with the requirements of this Court's Admiralty Rules, and that the use of the writ in this case is sanctioned by the principle which this Court recognized in *U. S. Alkali Association* v. *United States*, 325 U. S. 192, 202. For this reason, we have joined herewith our motion for leave to file a petition for writ

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of mandamus, and respectfully ask that this Court consider this argument and petition in support of the application for mandamus and the petition for that relief hereto annexed.

Respectfully submitted,

KRISEL, BECK & TAYLOR

By MAURICE A. KRISEL
Attorneys for Petitioner

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Tankport Terminals, Inc., petitioner, respectfully moves the Court for leave to file the petition for a writ of mandamus hereto annexed, and further moves that an order and rule be entered and issued directing the Honorable United States District Court for the Southern District of New York, and the Honorable Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief as may be just.

Krisel, Beck & Taylor

By Maurice A. Krisel
Attorneys for Petitioner

In the

Supreme Court of the United States

October Term, 1956

No.

Tankport Terminals, Inc.,

Petitioner,

—vs.—

The Honorable the United States District Court for the Southern District of New York, and the Honorable Sylvester J. Ryan, Judge of the United States District Court for the Southern District of New York,

Respondents.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND THE HONORABLE SYLVESTER J. RYAN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Tankport Terminals, Inc., respectfully shows the following:

1. This Honorable Court is respectfully referred to the facts set forth at pages 3 to 6 of the petition for writ of certiorari hereto attached for a detailed statement of

the proceedings had in the District Court of the United States in the Limitation of Liability proceeding instituted in that Court by Wills Lines, Inc., and these facts are incorporated herein.

2. Petitioner contends that the order of Judge Ryan described at page 5, *supra*, violates the mandate of the Limitation of Liability statute and the implementing Admiralty Rules of this Court, and, in particular, Rules 51, 52 and 53 thereof; and if, contrary to our view, the order of Judge Ryan is not appealable because not a final order and not appealable under the "collateral order doctrine" as expounded in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, then we respectfully submit that the ruling of the District Court is one which this Court can and should correct by writ of mandamus.

WHEREFORE, petitioner prays that a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Southern District of New York and to the Honorable Sylvester J. Ryan, Judge of said Court, requiring them to show cause on a day to be fixed by this Court why mandamus should not issue from this Court requiring that Judge Ryan vacate his order entered January 18, 1955, and why Judge Ryan and the said Honorable Court should not enter an order denying Wills Lines, Inc. the right to contest its liability or the liability of the M/V MAYFAIR, unless within ten (10) days after service upon its proctor of such order, with notice of entry, it deposits the additional sum of $15,000.00, or files an additional stipulation of $15,000.00, with approved surety, with the Clerk of the United States District Court for the Southern District of New York; that

etitioner should have such additional relief and process s may be necessary and appropriate in the premises.

Respectfully submitted,

KRISEL, BECK & TAYLOR

By MAURICE A. KRISEL
Attorneys for Petitioner

APPENDIX

183. *Liability of owner not to exceed interest; exceptions; "tonnage"; loss of life or bodily injury; privity; "seagoing vessel."*—(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. * * * (R. S., Sec. 4283).

185. *Vessel owner may deposit sum equal to interest with court for benefit of claimants, or transfer interest to trustee.*—The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended (Sec. 183 of this title), or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security

therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended (Sec. 183 of this title). Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease (R. S., Sec. 4285).

Supreme Court Admiralty Rules

51. *Limitation of liability—How claimed.*—The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code (46 Secs. 183-189)) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his

petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act (46 Sec. 188).

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so

far as known and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

52. *Filing and proof of claim in limited liability proceedings.* • •

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception conroverting the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight; and if the court finds that the amount of the interim stipulation is either insufficent or excessive, the court shall make an order for the payment of the proper amount into court or, as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

53. *Rights of owner to contest liability and of claimants to contest exoneration from liability or limitation of liability of owner.*—In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requrements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damagesas aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest

the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied. (As amended, June 21, 1948.)

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 30—October Term, 1955.

(Argued October 4 and 5, 1955

Decided November 22, 1955.)

Docket No. 23510

In the Matter of the Petition

of

WILLS LINES, INC.,

for exemption from, or limitation of, liability,

Petitioner-Appellee,
Cross-Appellant,

TANKPORT TERMINALS, INC.,

Claimant-Appellant,
Cross-Appellee.

Before:

CLARK, *Chief Judge*, and
MEDINA and LUMBARD, *Circuit Judges.*

In a limitation of liability proceeding in admiralty, claimant appeals from so much of an order of the United States District Court for the Southern District of New York as denies its application for an interlocutory decree *pro con-*

fesso; and petitioner cross-appeals from so much of the same order as denies limitation and from a miscellany of other orders. Sylvester J. Ryan, *Judge.* Both appeals dismissed.

HARRY D. GRAHAM, New York City, *for petitioner-appellee-cross-appellant.*

KRISEL, BECK AND TAYLOR, New York City (Maurice A. Krisel, Max Taylor and Irving Arthur James, New York City, Advocates), *for claimant-appellant-cross-appellee.*

MEDINA, *Circuit Judge:*

These are cross-appeals in a proceeding in admiralty for exoneration from, or limitation of liability for damages caused by petitioner's M/V Mayfair when she came in contact with claimant's pier on the evening of January 15, 1953, in a fog.

The limitation proceeding was commenced on March 31, 1953 by the filing of the petition; and on the same day, pursuant to *ex parte* orders, a stipulation and *ad interim* bond in the amount of $15,056.25 were filed in the usual form, accompanied by the issuance of a monition and the customary restraining order. In due course proceedings before a Commissioner resulted in a finding that the interest of petitioner in the vessel was $30,000; this finding was confirmed by Judge Clancy; and an order was made by Judge Bicks, on September 23, 1954, directing petitioner to file an additional stipulation and security for $15,000. This petitioner failed to do. Claimant thereupon moved for a decree *pro confesso.* The matter came on for hearing before Judge Ryan who refused to enter an interlocutory default decree, but, instead denied so much of the petition as prayed for

exoneration from or limitation of liability, and vacated the restraining order. There was no dismissal of the proceeding, but rather a direction that claimant might proceed to trial therein or bring an independent suit at its election.

The main appeal is by claimant from so much of Judge Ryan's order as denies the application for an interlocutory default decree. In a perfunctory way, without citation of authority or the statement of any reasons, petitioner advances the contention that the main appeal must be dismissed.

The notice of the cross-appeal is a fantastic document. By it petitioner purports to appeal not only from that part of Judge Ryan's order which denies petitioner the right to limit its liability, but also from "all of the intermediate orders and proceedings subsequent to the 6th day of May, 1953," including the order of reference to the Commissioner, the order confirming the Commissioner's report, "and such other pertinent orders in connection with the compulsory evaluation and orders thereon." But no motion has been made on claimant's behalf to dismiss the cross-appeal, nor has the appealability of the various order referred to in petitioner's notice of cross-appeal been discussed in the brief of claimant or on oral argument.

The file in the clerk's office discloses a mass of miscellaneous orders; and petitioner's counsel seems to have had a perfect procedural field day. But nothing remotely resembling a determination "of the rights and liabilities of the parties," as provided in 28 U. S. C. Sec. 1292(3), has yet taken place.

When, by amendment in 1926, certain interlocutory appeals were permitted in admiralty cases, it was not contemplated that the dockets of appellate courts in the federal system should be burdened with all the odds and ends of interlocutory orders, most or all of which would in any event be reviewable on an appeal by an aggrieved party

from a final decree. It has been repeatedly held, in this Circuit and elsewhere, that interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases" means deciding "the merits of the controversies between them." *The Maria*, 2 Cir., 67 F. 2d 571; *H. Lissner & Co., Inc.* v. *Oceanic Steam Nav. Co. Ltd.*, 2 Cir., 30 F. 2d 290; *Jarka Corp.* v. *Rederii*, 1 Cir., 110 F. 2d 234; *Postal S.S. Co.* v. *International Freighting Corp.*, 5 Cir., 133 F. 2d 10; *Emerick* v. *Lambert*, 6 Cir., 187 F. 2d 786.

Accordingly, as each of the orders referred to in the main appeal and the cross-appeal as well, are plainly interlocutory and as none of them determine "the rights and liabilities of the parties to admiralty cases" the appeals must be dismissed, unless claimant can bring its appeal within the principle of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, which it tries to do. In that case it was held that appeals would lie from certain orders which, while technically interlocutory, "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." That case was decided before the effective date of the amendment to Rule 54(b) and does not therefore consider the effect of that amendment. See *Republic of Italy* v. *DeAngelis*, 2 Cir., 206 F. 2d 121, at 132. See also *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684.

Where a district court has denied a motion to compel a minority stockholder to post security required by an applicable state statute, or where an attachment or garnishment has been vacated, it is easy to see that, unless an appeal is allowed promptly after the issuance of the order, it will be too late to correct the error. A plaintiff in a minority stockholders' suit, who bought 100 shares of stock a few days before commencing the action may well turn

out, after the dismissal of the suit on the merits, to be possessed of no property whatever. If the court erroneously refuses to compel plaintiff to post the security in the beginning, this is for all practical purposes "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U. S. at pp. 546-7. Similarly in the case of an order vacating an attachment. "Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." 339 U. S. at p. 689.

But here postponement of a consideration on appeal of claimant's alleged right to an interlocutory decree *pro confesso* will cause it no irreparable damage. If claimant prevails on the merits, his earlier objection will merge in the judgment. If, on the other hand, claimant loses on the merits, he may still review the order now sought to be reversed, on his appeal from the final judgment disposing of the case, and, at the same time, raise such questions as the record of the trial on the merits may disclose. In the meantime, he may have been needlessly exposed to the expense of prosecuting the case and proving his case on the merits. But this is unavoidable and may well be the consequence of any interlocutory and non-appealable orders, such as those denying motions for summary judgment or for the entry of default judgments generally.

As we have no jurisdiction of either the main appeal or of the cross-appeal we have no alternative other than to dismiss them.

Appeals dismissed.